TAN CHEE HOE & ANOR.

v.

UNITED MALAYAN BANKING CORPORATION

HIGH COURT MALAYA, LABUAN
TUAN TEE AH SING JC
[CIVIL APPEAL NO. K11-07 OF 1995]
10 MAY 1996

CIVIL PROCEDURE: *Order 3 r. 2(1) & 2(2) SCR 1980 - Defence to be filed within one month from 15 November 1994 - Judgment in default entered on 14 December 1994 - Computation of time - Whether judgment in default premature.*

WORDS & PHRASES: *"Month" - "Calendar month."*

The appellant/2nd defendant appealed against the dismissal of his application to set aside a judgment in default of defence dated 14 December 1994. The judgment was entered upon the appellant's failure to comply with an order of the learned Magistrate to file his defence within one month from 15 November 1994. It was the submission of Counsel for the appellant that the judgment was premature as 15 November 1994 should have been excluded in computing the period of one month which he claimed commenced on 16 November 1994 and ended on 15 December 1994.

The question was when the period of one month began to run.

Held:

On a computation under O. 3 r. 2(2) of the Subordinate Courts Rules 1980, the period of one month commences on 16 November 1994 and ends on 15 December 1994. Therefore the last day for the defendant to file his statement of defence was on 15 December 1994. As the judgment in default of defence was entered on 14 December 1994, it was premature and should be set aside *ex debito justitiae.*

[Appeal allowed with costs]

Cases referred to:
Migotti v. Colvill [1879] 4 CPD 233 ***(foll)***
Anlaby & Ors. v. Praetorius [1888] 20 QBD 764 ***(foll)***

Legislation referred to:
Subordinate Courts Rules 1980, O. 3 r. 2(1), (2)

For the appellant - Rakhbir Singh; Rakhbir Singh & Co.
For the respondent - Yong Shui Leng; M/s. J. Ambrose & Partners.

JUDGMENT

Tee Ah Sing JC:

This is an appeal by the appellant/2nd defendant (hereinafter referred to as "the 2nd defendant") against the decision of the learned Magistrate in dismissing the 2nd defendant's application to set aside the judgment in default of defence dated 14 December 1994.

In the judgment dated 14 December 1994 (page 6 of the record of appeal) it is recited that the 2nd defendant disputed the plaintiffs' claim whereby it was ordered that the defence shall be filed within one month from 15 November 1994 thereof, provided that in default of defence being filed judgment shall be entered for the plaintiffs accordingly.

And judgment in default of defence was entered against the 2nd defendant on 14 December 1994.

The learned Counsel for the 2nd defendant submitted that the 15 November 1994 should be excluded from the computation of time and the period of one month commences from 16 November 1994 and ends on 15 December 1994. (See O. 3 r. 2(1) of the Subordinate Courts Rules 1980 ("the SCR"). Therefore since judgment was obtained on 14 December 1994 it is clearly not in terms of the judgment of the Court and is therefore premature. The judgment ought to be set aside as of right.

Order 3 r. 1 of the SCR provides as follows:

> 1. Without prejudice to the Interpretation Act 1967, in its application to these rules, the word "month", where it occurs in any judgment, order, direction or other document forming part of any proceedings in a Sessions Court means a calendar month unless the context otherwise requires.

Order 3 r. 2(2) of the SCR provides as follows:

> (2) Where the act is required to be done within a specified period after or from a specified date the period begins immediately after that day.

On a computation under O. 3 r. 2(2) of the SCR the period of one month commences from 16 November 1994. So what is one calendar month? The definition of 'calendar month' as found in Words and Phrases Legally Defined (2nd Edn.) at p. 291 is as follows:

> Calendar month
>
> The term a calendar month is a legal and technical term ... The meaning of the phrase is that, in computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days; and that one calendar month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month less one (*Migotti v. Colvill* [1879] 4 CPD 233 at p. 238 CA, per Brett LJ).

Therefore the one month period begins on 16 November 1994 and ends on 15 December 1994. The 15 December 1994 fell on a Thursday. It was not a public holiday. The last day for the defendant to file his statement of defence was on 15 December 1994. And as the judgment in default of defence was entered on 14 December 1994 it was entered one day early before the expiry and therefore premature and irregular.

In the case of *Anlaby and Others v. Praetorius* [1888] 20 QBD 764 at page 768 his Lordship Fry LJ said "... and as the writ was served on 21 January, and the time limited for appearance was 28 January, the last day for delivering the defence was ten days from 28 January, and the judgment entered on 7 February was premature and irregular. In such a case the right of the defendant to have the judgment set aside is plain and clear. The Court acts upon an obligation, the order to set aside the judgment is made *ex debito justitiae*, ..."

As such the judgment in default of defence should be set aside *ex debito justitiae*. In view of the aforesaid I allow the appeal with costs. The 2nd defendant shall file his statement of defence within 14 days from today.

Reported by Cindy Chan